Chan Ngok & Anor v Lim Soh Cheng & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3-22-583-1995
ABDUL AZIZ J
13 APRIL 1996

Civil Procedure *— Issue estoppel — Application to set aside consent order — Defendant claimed res judicata and issue estoppel existed — Whether there was justification in the defendants' contention that the earlier court had already found that there was no serious question to be tried as to whether the consent order was null and void — Whether the plaintiffs were estopped by the earlier decision from bringing present action to void the consent order*

This action concerns a piece of land which was held in trust for a Chinese temple built on it. The first and second defendants ('the Lim sisters'), who were the current trustees of the land, took a pledge not to alienate the land until the temple ceased to exist ('the alienation pledge'). On 31 May 1991, the first plaintiff and one Lim Kon How, who were retired trustees of the land, caveated the land with the reason that the Lim sisters intended to breach their alienation pledge and sell the land to a third party. The Lim sisters applied for the removal of the caveat and an order for sale of the land. On 1 April 1994, the court made orders in terms of an agreement supposedly reached by both parties which allowed for, inter alia, the removal of the caveat and the sale of the land ('the consent order'). However, another caveat was entered by the plaintiffs on 28 September 1994. The first plaintiff, on 2 May 1995, applied for an extension of that caveat. The Lim sisters opposed the caveat extension application and filed an affidavit in opposition. After several extensions of the caveat, the parties agreed to make written submissions to the court. The first plaintiff wanted the caveat to be preserved as she intended to commence proceedings to set aside the consent order which she claimed was tainted with fraud and misrepresentation. The Lim sisters, on the other hand, stated that the first plaintiff had no caveatable interest in the land. On 24 August 1995, the court decided that the first plaintiff had no caveatable interest and therefore the caveat extension was not allowed ('the first decision'). On 13 December 1995, the plaintiffs filed the writ in the present action for the consent order of 1 April 1994 to be set aside. The defendants argued that (a) the present action was an abuse of the process of the court as it was an action initiated for the purpose of mounting a collateral attack on the first decision; and (b) there was issue estoppel and res judicata. On 7 February 1996, the hearing of submissions was adjourned pending the court's decision on the point of res judicata.

Held, dismissing the contention of res judicata:

The point argued was actually one of issue estoppel rather than res judicata. On the facts, there was no justification in defence counsel's

contention that the earlier court made the first decision on the grounds that there was no serious question to be tried as to whether the consent order was null and void. Clearly, the application to extend the caveat was dismissed solely on the ground that the plaintiff had no caveatable interest. Therefore, the plaintiffs were not estopped by the first decision from bringing the present action to void the consent order and the defendants failed on the question of issue estoppel (see p 487C–E, H–I).

[Bahasa Malaysia summary

Ini adalah tindakan berkenaan dengan sekeping tanah ('tanah itu') yang dipegang dalam amanah untuk sebuah tokong Cina yang dibina di atasnya. Defendan pertama dan kedua ('adik beradik Lim'), yang menjadi pemegang amanah semasa tanah itu, mengangkat sumpah supaya tidak memberimilik tanah itu sehingga tokong itu tidak wujud lagi ('sumpah berimilik'). Pada 31 Mei 1991, plaintif pertama dan seorang bernama Lim Kon How, iaitu pemegang amanah tanah itu yang sudah bersara, telah memasukkan kaveat ke atas tanah itu atas alasan bahawa adik beradik Lim berniat untuk memungkiri sumpah berimilik mereka dan menjual tanah itu kepada satu pihak ketiga. Adik beradik Lim memohon untuk mengetepikan kaveat itu dan untuk mendapatkan perintah untuk menjual tanah itu. Pada 1 April 1994, mahkamah telah membuat perintah mengikut satu perjanjian yang dikatakan telah dicapai atas persetujuan kedua-dua pihak yang, antara lainnya, membenarkan kaveat itu diketepikan dan tanah itu dijual ('perintah persetujuan itu'). Walau bagaimanapun, satu lagi kaveat dimasukkan oleh plaintif pada 28 September 1994. Plaintif pertama, pada 2 Mei 1995, memohon untuk perlanjutan kaveat itu. Adik beradik Lim membantah terhadap permohonan perlanjutan kaveat itu dan memfailkan afidavit bantahan. Selepas beberapa perlanjutan kaveat diberikan, pihak-pihak yang berkenaan bersetuju untuk memberikan penghujahan bertulis kepada mahkamah. Plaintif pertama mahukan kaveat itu dikekalkan kerana dia ingin memulakan prosiding untuk mengetepikan perintah persetujuan itu yang katanya dicemar oleh fraud dan salah nyata. Adik beradik Lim, sebaliknya, mengatakan bahawa plaintif pertama tidak mempunyai kepentingan yang boleh dikaveatkan di dalam tanah itu. Pada 24 Ogos 1995, mahkamah memutuskan bahawa plaintif pertama tidak mempunyai kepentingan yang boleh dikaveatkan dan oleh itu perlanjutan kaveat itu tidak dibenarkan ('keputusan pertama itu'). Pada 13 Disember 1995, plaintif-plaintif telah memfailkan writ dalam tindakan ini supaya perintah persetujuan bertarikh 1 April 1995 itu diketepikan. Defendan mengatakan bahawa (a) tindakan ini adalah satu penyalahgunaan proses mahkamah kerana ianya adalah satu tindakan yang dibawa bagi tujuan mencabar keputusan pertama itu; dan (b) terdapat isu estopel dan res judicata. Pada 7 Februari 1996, pembicaraan itu telah ditangguhkan sehingga mahkamah membuat keputusan di atas perkara res judicata.

Diputuskan, menolak hujah tentang res judicata:

Perkara yang dihujah sebenarnya adalah isu estopel dan bukan res judicata. Mengikut fakta kes, tidak terdapat justifikasi dalam hujah peguam defendan bahawa mahkamah yang terdahulu telah membuat keputusan pertama itu atas alasan bahawa tidak terdapat persoalan yang serius untuk dibicarakan mengenai soalan sama ada perintah persetujuan itu batal dan tidak sah. Jelasnya, permohonan untuk melanjutkan kaveat itu ditolak hanya atas sebab bahawa plaintif tidak mempunyai kepentingan yang boleh dikaveatkan. Maka, plaintif tidak diestop oleh keputusan pertama itu daripada membawa tindakan ini untuk membatalkan perintah persetujuan itu dan defendan telah gagal atas persoalan isu estopel (lihat ms 487C–E, H–I).]

Notes

For cases on res judicata and issue estoppel, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2918–2923.

Case referred to

Hunter v Chief Constable of West Midlands Police [1981] 3 All ER 727

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2B)

VS Viswanathan and TH Goh (*TH Su & Co*) for the plaintiffs.

Bhagwant Kaur and Paul Ong (*Paul Ong & Associates*) for the first, second and fourth defendants.

Cur Adv Vult

Abdul Aziz J: This action concerns a piece of land at Lorong Ceylon, Kuala Lumpur, and a Chinese temple on it known as the Kuen Chook Hiong Lim (Kwan Yim Nyiong) Temple. There are before me three interlocutory applications: (i) a joint one by the first defendant, Lim Soh Cheng ('the first Lim sister'), and the second defendant, Lim Sook Ling ('the second Lim sister'), for the setting aside of certain injunctions that I granted ex parte on 14 December 1995 on the application of the plaintiffs; (ii) one by the fourth defendant, Thermagard (M) Sdn Bhd ('Thermagard'), also for the setting aside of those injunctions; and (iii) another by the plaintiffs, which is an inter partes application for the like injunctions. This judgment relates to the first phase of submissions on the three applications, which I have ordered to be heard together.

The land has been held in trust for the temple since 20 April 1931.

On 23 May 1964, the first plaintiff, Chan Ngok, became one of the trustees of the land. Another trustee was one Lim Kon How. There were seven other trustees on that date. In a deed of trust of the same date, the nine trustees declared, 'That they shall not save by express provision of the court and only when the temple has ceased to exist and cannot serve

mankind or any section or part of them or the Chinese community or any part of them alienate the said land ...'. I shall refer to the declaration as 'the alienation pledge'. A

On 8 June 1989, the first Lim sister became an additional trustee. There were on that date three other trustees, namely Chan Ngok, Lim Kon How and another person. On 28 March 1990, those three other trustees retired, leaving the first Lim sister as the sole trustee, who then appointed the second Lim sister to be an additional trustee. Since then the trustees have been the two Lim sisters. On that date, they reiterated the alienation pledge and they also gave an undertaking to the three retiring trustees to appoint three named persons, said to be Chan Ngok's adopted daughters, as additional trustees when they reached the age of 21. One of them was the second plaintiff, Chan Sook Mun, who has now attained 21 on 10 October 1995. B C

On 31 May 1991, Chan Ngok and Lim Kon How, who had retired as trustees on 28 March 1990, caveated the land. In their statutory declaration in support of their caveat application, they said it had come to their knowledge that the Lim sisters intended, in breach of the alienation pledge, to sell the land to a third party and they intended to take civil action to stop the sale and they wished to maintain the status quo until the determination of the civil action so as to protect the interests of the temple. D

On 25 November 1991, the Lim sisters, by Originating Summons No S2–24–1238–91, applied for three orders: (i) an order for removal of the caveat; (ii) an order for sale of the land for not less than RM10,000,000 and purchase of a new land for building a new temple to replace the existing one; and (iii) an order authorizing the obtaining of a loan for building the new temple. They cited Chan Ngok and Lim Kon How as respondents. In the supporting affidavit, reasons were given for the need to build a new temple. One reason was that the temple building was no longer safe. For present purposes, I need not mention the other reasons and other matters stated in the affidavit. E F

In their affidavit in reply, Chan Ngok and Lim Kon How gave reasons why the land should not be sold and the temple should be preserved. They said that the sale would be a breach of trust and of their fiduciary duties by the Lim sisters. They believed that the proceeds of sale would be misapplied by the Lim sisters. They gave other reasons and stated other things which I need not mention here. G

On 21 July 1992, the need for the Attorney General's consent to the Lim sisters' application was raised in court by counsel for Chan Ngok and Lim Kon How. Wan Mohamed Mustapha J ordered the Lim sisters to obtain the Attorney General's consent. H

On 27 July 1992, Lim Kon How died having appointed Chan Ngok executrix of her will.

On 1 March 1993, the Attorney General gave his consent under s 9(1) of the Government Proceedings Act 1956. The consent was to the commencement of proceedings in Originating Summons No S2–24–1238–91 by the Lim sisters for certain orders specified in the consent. Stated I

briefly or to the effect, the more important of the orders that were consented to be sought by the Lim sisters were as follows:

(1) a declaration deeming the temple to have ceased to exist because it was no longer safe to be used and it no longer served mankind or part of them or the Chinese community or part of them. (Obviously it was hoped that such a declaration would overcome the restriction of the alienation pledge.);

(2) a declaration authorizing the Lim sisters to sell the land at market value and requiring the purchase price to be used for buying a new land for building a new temple;

(3) an order removing the caveat;

(4) an order that a new temple be built on a new land;

(5) an order authorizing the Lim sisters to borrow money for expenses on account of the new temple; and

(6) a declaration that the Lim sisters were not bound by their undertaking to appoint Chan Ngok's three adopted daughters as additional trustees upon their attaining 21.

On 23 July 1993, by summons in chambers in Originating Summons No S2–24–1238–91, the Lim sisters applied for orders that Chan Ngok and Lim Kon How shall cease to be parties in the originating summons, except as regards the application of the Lim sisters for removal of the caveat, and that the Attorney General be added instead as the respondent. The reason given was that, as the land and temple were a charitable trust and Chan Ngok and Lim Kon How were no longer trustees, the Attorney General was the proper party to represent the interests of the trust and respond to the originating summons. On 4 September 1993, there were submissions on that application and the matter was postponed to 8 October 1993 for the Attorney General's comments. On that date, all the parties, including the Attorney General, agreed to a postponement with a view to a settlement.

On 4 November 1993, Chan Ngok signed a mandate to negotiate addressed to the third defendant, John Hendricks ('Hendricks'), said to be her adopted son, by which she authorized him to negotiate and settle Originating Summons No S2–24–1238–91 with the Lim sisters or their solicitors.

After several postponements, on 1 April 1994, in the presence of both sides, Wan Mohamed Mustapha J made orders in terms of an agreement reached by both sides as in a draft order submitted to the court. The Attorney General subsequently, on 9 May 1994, approved the draft order. The order, as approved by all the parties, stated that in court on 1 April 1994 the solicitors for Chan Ngok and Lim Kon How were also mentioning for the Attorney General and provided for 14 matters, of which I need only mention the following:

(1) that the land be sold to Thermagard for RM10,757,565;

(2) that the Lim sisters be allowed to take a loan to buy and build a new temple in Subang, Selangor;

(3) that the caveat be removed; A

(4) that compensation of RM80,000 be paid to Chan Ngok and Lim Kon How within two weeks after receipt of the purchase price for the land;

(5) that the memorandum of understanding dated 28 March 1990 (by which, inter alia, the Lim sisters undertook to appoint Chan Ngok's three adopted daughters as additional trustees) be terminated; and B

(6) that a new memorandum of understanding be executed under which the second plaintiff, Chan Sook Mun, and another of the three persons would be appointed trustees for the temple upon their attaining 25.

On 1 April 1994 itself, the Lim sisters granted to Thermagard an option to purchase the land for RM10,757,565, to be exercised before 5pm, C 31 October 1996.

Pursuant to an application presented on 28 September 1994, another caveat was entered against the land. The Presentation No was 10315/94.

On 2 May 1995, by Originating Summons No S4–24–269–95, Chan Ngok, acting for herself and also as executrix of the estate of Lim Kon D How, applied for extension of the caveat. She cited the Lim sisters as the defendants. The matters set out in her affidavit in support of the application may be summarized as follows:

(a) The consent judgment of 1 April 1994 was entered by counsel acting for her and the estate of Lim Kon How on the instructions of Hendricks, E but the mandate to negotiate had been obtained from her by Hendricks by fraud.

(b) The mandate, according to it, was from her only. So, Hendricks had no authority to act for the estate of Lim Kon How and the estate had not given any authority to counsel to enter the consent judgment. F

(c) She had retired as trustee on condition that her three adopted children be made additional trustees when they attained 21. But although one of them, Chan Yun Yoon, had attained 21 (on 6 February 1991), the Lim sisters were unwilling to appoint her. So the retirement of the three trustees and the appointment of an additional trustee that took G place on 28 March 1990 were null and void and Chan Ngok must be reinstated as trustee and the second Lim sister must cease to be trustee.

(d) The Lim sisters had caused loss to the trust. The reason was that on 7 March 1990, the four trustees then had signed an agreement H appointing Istan Sdn Bhd to manage the land for commercial use, but the signatures of Chan Ngok and Lim Kon How had been obtained by fraud. Istan had subsequently sued the four persons for refusing to proceed with the agreement.

(e) The Lim sisters had no power to sell the land as the conditions in the alienation pledge had not been satisfied. I

(f) The sale price was below market price.

(g) The Lim sisters had kept for their own use certain incomes of the trust.

(h) Chan Ngok intended to commence an action to set aside the consent judgment and to ask for other reliefs, which were specified. If the land was sold, the Lim sisters would use the income for their personal purposes. The caveat was necessary to preserve the status quo until the conclusion of the action to set aside the consent judgment.

The Lim sisters opposed the caveat extension application and filed an affidavit in opposition.

The application first came before Rahmah Hussain J on 29 May 1995, and on three more occasions before the date of decision, which was 25 August 1995. On each of those occasions, she extended the caveat until the next date. On the occasion on 25 July 1995, the parties agreed to make written submissions.

From the written submission of learned counsel for Chan Ngok, it is clear that she wanted the caveat to be preserved because she intended to commence proceedings to set aside the consent judgment and the sale of the land pursuant to the consent judgment, and that her grounds for claiming the consent judgment should be set aside were that it was tainted with fraud and misrepresentation by reason of Hendricks' mandate to negotiate having been obtained by fraud or misrepresentation, that the estate of Lim Kon How did not give consent to the judgment, and that the Lim sisters did not have power to sell the land because, notwithstanding the consent judgment, the sale would be in breach of the alienation pledge as the conditions it laid down had not been satisfied and because the sale price was less than the market value.

In the written submission of learned counsel for the Lim sisters, the points raised in argument were clearly and distinctly set out. They may be summarized as follows:

(a) The estate of Lim Kon How had no locus standi to make the application for extension because the caveat had been entered by Chan Ngok only.

(b) There was no evidence before the court of the grounds for entering the caveat. Form 19B and the statutory declaration required by s 323(3) of the National Land Code 1965 were not exhibited. Therefore, Chan Ngok had failed to satisfy the court that she had a caveatable interest. (I have to remark that that is indeed true. Although the application was for extension of a caveat, the affidavit in support thereof gave no particulars whatsoever of the caveat. It did not even mention the circumstances by reason of which, according to s 326, the application was necessary.)

(c) Chan Ngok had no caveatable interest under s 323(1). As she was an ex-trustee claiming to be restored to the trusteeship, she could not be a person 'claiming title to, or any registrable interest in' the land or 'claiming to be beneficially entitled under any trust affecting' the land.

(This point about caveatable interest is really a point as to something akin to locus standi.)

(d) There was no serious question to be tried. Any questions raised by Chan Ngok relating to matters other than the consent judgment itself, such as that the Lim sisters did not have the power to sell the land, or that the temple still existed and so no order could have been obtained authorizing the sale, or that it was doubtful whether the Attorney General was aware of the terms of the consent order and would have consented to certain provisions if he had been aware of them, were irrelevant because the issues would have been 'crystallized' in the consent judgment. So the only question was whether the consent judgment was obtained by fraud. As Chan Ngok had independent legal advice, it was highly unlikely there was any element of fraud involved in the recording of the consent judgment. Moreover, unless Chan Ngok had expressly restricted her solicitors' authority, their authority impliedly extended to entering into a compromise. The consent judgment was therefore valid. As the allegation of fraud was one against Hendricks, Chan Ngok's remedy was against him and possibly against her solicitors, but not against the Lim sisters. Therefore, Chan Ngok had failed to establish a serious question to be tried as to whether the consent judgment ought to be set aside on the ground of fraud.

(e) The balance of convenience was in favour of leaving the caveat on the register.

The written submission of counsel for Chan Ngok and the estate of Lim Kon How was received by the court on 4 August 1995. That of counsel for the Lim sisters was received on 7 August 1995. 15 August 1995 had been fixed for decision. On that day, counsel for Chan Ngok applied for further time to submit a written reply. Rahmah Hussain J allowed him only until 19 August 1995 and fixed 24 August 1995 for decision. It does not appear from the records that Chan Ngok's counsel did submit a written reply. On 24 August 1995, before Rahmah Hussain J delivered her decision, counsel for Chan Ngok informed her, according to her notes:

> Saya baru diberitahu oleh pejabat tanah pada 3 Ogos 1995 bahawa kaveat telah luput sendiri pada 5 Jun 1995 oleh kerana lanjutan kaveat telah didaftar luar masa.

Her decision, according to her notes, was as follows:

> Saya bersetuju dengan hujahan peguam defendan bahawa pihak plaintif pertama telah gagal menunjukkan kepentingan yang boleh dikaveat di bawah undang-undang. Oleh yang demikian, permohonan plaintif ditolak dengan kos.

Before me, the question has been raised as to what were the issues that Rahmah Hussain J had actually decided and what was her decision on those issues. I proceed now to state my opinion on it.

Rahmah Hussain J did not deliver a reasoned written judgment. There is only what is written in the note book, as quoted just now. Such being the situation, to attempt to determine what issue or point she actually decided or over which she was in agreement with counsel for the Lim sisters, it is necessary to look at his written submission. Had Rahmah Hussain J merely dismissed the application without saying anything more, the task would be an impossible one. She might have done so because she agreed with counsel on only one point, that is, point (b), (c), (d) or (e) in my earlier summary. She might have done so because she agreed on any two or more or all of them. Fortunately she said more than merely that she dismissed the application. She must be taken at her word. She said that she agreed with the submission that Chan Ngok had failed to show a caveatable interest.

As my summary shows, the question about caveatable interest was argued as points (b) and (c) in the summary, which, in the written submission, were dealt with under the heading 'Does the plaintiff's application disclose a caveatable interest?' It was in connection with those two points that any mention of caveatable interest was made. The point (b) submission was that Chan Ngok had failed to establish she had a caveatable interest. The point (c) submission was that Chan Ngok had no caveatable interest (in the sense of locus standi) under s 323(1). Those two points, as the argument went, did not involve the question of validity of the consent order. That question was involved with the question of whether there was a serious question to be tried, which question was argued as point (d), which, in the written submission, was dealt with under the heading, 'Does the affidavit evidence disclose a serious question to be tried?', as a separate and distinct question from the question of caveatable interest already argued as points (b) and (c). The separateness of treatment of the caveatable interest question from that of a serious question to be tried was made clearer still by the first paragraph under the latter heading — para 33 — which said:

> Assuming that Your Ladyship finds that the first plaintiff has a caveatable interest, then the affidavit evidence has to be examined to ascertain whether there is a serious question to be tried.

Since Rahmah Hussain J said that she agreed with counsel for the Lim sisters that Chan Ngok had failed to show or prove a caveatable interest, and since counsel for the Lim sisters had submitted about caveatable interest only as points (b) and (c), Rahmah Hussain J could only have agreed as regards either point (b) or (c) or both. But whatever the true choice may have been as between points (b) and (c), such being the wording of the judgment and such being the manner in which the written submission for the Lim sisters was set out, I would have no justification for concluding that Rahmah Hussain J found, or also found, that there was no serious question to be tried as to whether the consent order was null and void.

On 13 December 1995, Chan Ngok and Chan Sook Mun filed the writ in the present action. The statement of claim contained 13 prayers,

including prayers for the reinstatement of Chan Ngok and the appointment of Chan Sook Mun as trustees and the removal of the Lim sisters. Most of the prayers have since been abandoned, and there are left only prayers for an order to set aside the consent order of 1 April 1994 and for certain injunctions, besides the usual prayers for other reliefs and costs. The injunctions are to prevent the land from being sold and to preserve the state of the land and the temple.

With the abandonment of the other prayers, the sole object of this action is, therefore, to have the consent order set aside. For the purposes of this judgment it is not necessary for me to summarize the averments in the statement of claim. It is only necessary to state that the setting aside of the consent order is sought on the basis of the averment that the consent order was obtained by fraud, cheating or misrepresentation, or a combination of them, on Chan Ngok, the Attorney General and the court. One particular instance of fraud or misrepresentation alleged that I need mention is in connection with the obtaining of the consents of Chan Ngok and Lim Kon How to the consent order, which was alleged to have been the work of Hendricks done in concert with the Lim sisters.

I would remark that with only those prayers left, Chan Sook Mun no longer seems a relevant plaintiff and that, even with the original prayers, I cannot see what is the relevance of Hendricks as a defendant.

On the same day that they filed the writ, Chan Ngok and Chan Sook Mun also filed an ex parte summons in chambers in this action for several injunctions for the like purposes as those prayed for in the statement of claim. The summons in chambers was supported by the affidavit of Chan Ngok who said she was affirming the affidavit also for Chan Sook Mun and in her capacity as administrator of the estate of Lim Kon How. The contents of the statement of claim are more or less repeated in the affidavit.

I heard the ex parte application on 14 December 1995 and granted the injunctions sought. On 19 December 1995, the Lim sisters and Thermagard filed their applications to set aside the ex parte injunctions.

Because O 29 r 1(2B) of the Rules of the High Court 1980 limits the life of an ex parte injunction to two weeks, on 21 December 1995, Chan Ngok and Chan Sook Mun filed an inter partes application for the same injunctions, relying on the affidavit in support of the ex parte application.

On 25 January 1996, I commenced hearing of the setting aside and the inter partes injunction applications together. It was on that day, in the course of argument on the question of the need for the Attorney General's consent to the present action, that, as has been mentioned, certain prayers in the statement of claim were abandoned and I consequently struck them out.

The hearing of submissions continued on 2 February 1996, 5 February 1996 and 7 February 1996. There were two points of law raised for the first, second and fourth defendants. One was based on *Hunter v Chief Constable of West Midlands Police* [1981] 3 All ER 727, and that was that the present action was an abuse of the process of the court, being an action

initiated for the purpose of mounting a collateral attack on a final decision in the caveat extension application. The other was issue estoppel and res judicata. Much of the submission was on the latter point. I believe I did, during submission, express the opinion that the collateral attack that was held to be an abuse of the process of the court in *Hunter* had to do with circumstances entirely different from those obtaining in this case.

So on 7 February 1996, the hearing of submissions was adjourned pending my decision on the point of res judicata and another date was fixed for submission on the merits should the defendants fail on the point of res judicata.

In arguing about res judicata, learned counsel for the defendants contended that Rahmah Hussain J had considered all the issues in the caveat extension case and that the question of fraud by Hendricks had been decided in that case. I think what was sought to be said by those contentions was that Rahmah Hussain J had found that there was no serious question to be tried as to whether the consent order was null and void because there was no serious question to be tried on, inter alia, the question of fraud by Hendricks. As to fraud on the Attorney General, it was said that that went to the question of whether the consent order was null and void, but since that had been decided in favour of the defendants, the plaintiffs were estopped from raising the question now as it was a question that could have been raised in the caveat extension proceedings. Therefore the plaintiffs were estopped by the caveat decision from contending in the present action that the consent order was null and void for whatever reason, even that of the alleged fraud on the Attorney General, and the application for the injunctions should be dismissed and with that the ex parte injunctions should be set aside. So argued, I think the point is one of issue estoppel rather than res judicata.

Learned counsel for the plaintiffs pointed out that several questions were raised in the caveat application — which, as has been seen, is correct — and thus it was not possible to know what finding Rahmah Hussain J had actually arrived at in dismissing the application. Learned counsel for the plaintiffs even suggested that Rahmah Hussain J dismissed the application not on the merits but because she was informed that the caveat had expired, so that no extension of it could be ordered. It is clear from the wording of the judgment that that was not the reason.

I have already shown that, judging from the submission of counsel for the Lim sisters in the caveat extension application and the terms of Rahmah Hussain J's decision, it cannot with justification be said that Rahmah Hussain J dismissed the caveat extension application because she found that there was no serious question to be tried as to whether the consent order was null and void. So the plaintiffs are not estopped by the caveat decision from bringing the present action to void the consent order and the defendants fail on the question of res judicata or, rather, issue estoppel.

I must here explain that the facts that I have set out about the history of this matter have been gleaned from all the affidavits in the present applications. I have also had to have recourse to the court records of the previous two proceedings in order to ascertain what had actually taken place in those proceedings. When I granted the ex parte application, I had only the facts given in the affidavit in support of that application. Further, the facts that I have set out are only such facts as I have felt necessary to set out primarily to dispose of the question of estoppel. When it comes to the merits of the applications, which must involve the merits of the plaintiffs' claim in this action, there will be other facts and further details to be considered.

Application allowed.

Reported by Ng Kian Pin